

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HARVEY A. WANK, D.M.D. : CIVIL ACTION
v. :
SANDRA F. SIEGEL : NO. 98-2053

MEMORANDUM AND ORDER

FULLAM, Sr.J. SEPTEMBER , 1998

This diversity action was brought by Harvey Wank, a Havertown, Pennsylvania dentist, against a former patient, pursuant to the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. Ann. §5701 et seq. (the Wiretap Act). The patient, Sandra Siegel, secretly taped a conversation she had with Dr. Wank in his office, for possible use in a malpractice action in New York in which Dr. Wank was a defendant. Dr. Wank is seeking damages in excess of \$75,000. Siegel has moved to dismiss, arguing: (1) Wank had no reasonable expectation of privacy in the taped conversation; and (2) at most, Wank is entitled to \$1,000 liquidated damages pursuant to 18 Pa. Cons. Stat. Ann. §5725(a), and thus the jurisdictional amount is not met. I will address the jurisdictional issue first.

The Wiretap Act provides:

(a) Cause of action.--Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication; and shall be entitled to recover from any

such person:

(1) Actual damages, but not less than liquidated damages computed at the rate of \$100 per day for each day of violation, or \$1,000, whichever is higher.

(2) Punitive damages.

(3) A reasonable attorney's fee and other litigation costs reasonably incurred.

18 Pa. Cons. Stat. Ann. §5725(a). The Act defines an “oral communication” as “[a]ny oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation.” 18 Pa. Cons. Stat. Ann. §5702; see also Agnew v. Dupler, No. 088 M.D. App. Dkt. 1996, slip op. at 9, 1998 WL 543879 (Pa. Aug. 25, 1998)(an oral communication is protected “only where the speaker possessed a reasonable expectation of privacy in the conversation.”). The Act does not define “violation,” “day” or “use.”

Dr. Wank seeks over \$200,000 in liquidated damages, computed at the rate of \$100 per day from the day Siegel taped their conversation until the day, over seven years later, when the jury returned a verdict in the malpractice action. Siegel, on the other hand, asserts that Wank's liquidated damages cannot exceed the \$1,000 statutory minimum, because there was only one “interception” and therefore one violation, on one day-- the day she taped the encounter.

Caselaw interpreting the Wiretap Act is exceedingly sparse. A plain reading of the statute, however, convinces me that a “violation” for purposes of §5725 consists of “interception,” “disclosure” or “use,” and not mere possession. Cf. Bailey v. United States, 516 U.S. 137, 143 (1995)(“use” of a firearm connotes more than mere possession). At most, Siegel violated the Wiretap Act on three occasions: when she taped her conversation with Dr. Wank, when she turned the tape over to her attorney, and, arguably, when it was used in the course of

the malpractice action. (I note, however, that it was not Siegel's attorney who used the tape; it was introduced by defense counsel.) There is no allegation that Siegel did anything else with the tape. Wank's liquidated damages, then, cannot exceed \$1,000 under any circumstances; he does not claim actual damages. Plaintiff can only satisfy the jurisdictional amount in controversy requirement with an award of attorneys' fees and punitive damages in excess of \$74,000. Under the circumstances presented here, this would be a preposterously high figure.

Even were I to hold that this Court has subject matter jurisdiction over this action, whether Dr. Wank had a reasonable expectation of privacy in his communication with Ms. Siegel has been cast into doubt in light of the division among the Justices of the Pennsylvania Supreme Court evidenced by Commonwealth v. Alexander, 708 A.2d 1251 (Pa. 1998)(three Justices finding in a constitutional right to privacy case that a doctor has no reasonable expectation of privacy in his conversations with a patient which take place in his office). Given the current state of the law under Pennsylvania's Wiretap Act, it is appropriate that this determination be made by the courts of the Commonwealth.

An Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HARVEY A. WANK, D.M.D. : CIVIL ACTION

v. :

SANDRA F. SIEGEL : NO. 98-2053

ORDER

AND NOW, this day of September, 1998, IT IS ORDERED:

1. Defendant's motion to dismiss is GRANTED.
2. The Complaint is DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

Fullam, Sr.J.